

SENATE BILL NO. 108

INTRODUCED BY L. JENT

BY REQUEST OF THE DEPARTMENT OF MILITARY AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING CUSTODY LAWS RELATING TO MILITARY SERVICE; PRECLUDING A COURT FROM CONSIDERING MILITARY SERVICE ALONE AS A DETRIMENT TO THE BEST INTEREST OF THE CHILD IN CHILD CUSTODY PROCEEDINGS EXCEPT IN CERTAIN CIRCUMSTANCES; ESTABLISHING AN EXPEDITED HEARING PROCEDURE WHEN A PARENT RECEIVES MILITARY SERVICE ORDERS; PROVIDING THAT A COURT-ORDERED MODIFICATION OF A PARENTING PLAN BASED ON MILITARY SERVICE ORDERS OF A PARENT IS TEMPORARY; ALLOWING VISITATION RIGHTS TO CERTAIN FAMILY MEMBERS WHEN A PARENT RECEIVES MILITARY SERVICE ORDERS; PRECLUDING A COURT FROM CONSIDERING MILITARY SERVICE ALONE IN PARENTING PLANS EXCEPT IN CERTAIN CIRCUMSTANCES; AND AMENDING SECTIONS 40-4-212, 40-4-216, 40-4-219, 40-4-228, AND 40-4-234, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 40-4-212, MCA, is amended to read:

"40-4-212. Best interest of child. (1) The court shall determine the parenting plan in accordance with the best interest of the child. The court shall consider all relevant parenting factors, which may include but are not limited to:

- (a) the wishes of the child's parent or parents;
- (b) the wishes of the child;
- (c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the child's best interest;
- (d) the child's adjustment to home, school, and community;
- (e) the mental and physical health of all individuals involved;
- (f) physical abuse or threat of physical abuse by one parent against the other parent or the child;
- (g) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent;
- (h) continuity and stability of care;

(i) developmental needs of the child;

(j) whether a parent has knowingly failed to pay birth-related costs that the parent is able to pay, which is considered to be not in the child's best interests;

(k) whether a parent has knowingly failed to financially support a child that the parent is able to support, which is considered to be not in the child's best interests;

(l) whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests. In making that determination, the court shall consider evidence of physical abuse or threat of physical abuse by one parent against the other parent or the child, including but not limited to whether a parent or other person residing in that parent's household has been convicted of any of the crimes enumerated in 40-4-219(8)(b).

(m) adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions.

~~(2) A court may not consider military service, as defined in 10-1-1003, against or to the detriment of a parent performing military service in determining the best interest of the child~~ WHEN DETERMINING THE BEST INTEREST OF THE CHILD OF A PARENT IN MILITARY SERVICE, THE COURT SHALL CONSIDER ALL RELEVANT PARENTING FACTORS PROVIDED IN SUBSECTION (1) AND MAY NOT DETERMINE THE BEST INTEREST OF THE CHILD BASED ONLY UPON THE PARENT'S MILITARY SERVICE unless the military service resulted in an DISMISSAL OR IN A DISCHARGE DESIGNATED AS other than honorable, bad conduct, or dishonorable discharge.

~~(2)(3)~~ A de facto parenting arrangement, in the absence of a prior parenting decree, does not require the child's parent or parents to prove the factors set forth in 40-4-219.

~~(3)(4)~~ The following are rebuttable presumptions and apply unless contrary to the best interest of the child:

(a) A parenting plan action brought by a parent within 6 months after a child support action against that parent is vexatious.

(b) A motion to amend a final parenting plan pursuant to 40-4-219 is vexatious if a parent seeks to amend a final parenting plan without making a good faith effort to comply with the provisions of the parenting plan or with dispute resolution provisions of the final parenting plan."

Section 2. Section 40-4-216, MCA, is amended to read:

1 **"40-4-216. Hearings.** (1) Parenting plan proceedings ~~shall~~ must receive priority in being set for hearing.

2 (2) Upon motion of a parent who has received military service orders, the court shall, for good cause
3 shown, hold an expedited hearing in parenting or visitation matters instituted under 40-4-228(6) if the military
4 service, as defined in 10-1-1003, of the parent has a material effect on the parent's ability or anticipated ability
5 to appear in person at a hearing scheduled in an unexpedited manner.

6 ~~(2)(3)~~ The court may tax as costs the payment of necessary travel and other expenses incurred by any
7 person whose presence at the hearing the court considers necessary to determine the best interest of the child.

8 ~~(3)(4)~~ The court, without a jury, shall determine questions of law and fact. If it finds that a public hearing
9 may be detrimental to the child's best interest, the court may exclude the public from a parenting hearing but may
10 admit any person who has a direct and legitimate interest in the particular case or a legitimate educational or
11 research interest in the work of the court.

12 ~~(4)(5)~~ If the court finds it necessary that the record of any interview, report, investigation, or testimony
13 in a parenting proceeding be kept secret to protect the child's welfare, the court may make an appropriate order
14 sealing the record."

15
16 **Section 3.** Section 40-4-219, MCA, is amended to read:

17 **"40-4-219. Amendment of parenting plan -- mediation.** (1) The court may in its discretion amend a
18 prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan or that were unknown
19 to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and
20 that the amendment is necessary to serve the best interest of the child. In determining the child's best interest
21 under this section, the court may, in addition to the criteria in 40-4-212, also consider whether:

- 22 (a) the parents agree to the amendment;
- 23 (b) the child has been integrated into the family of the petitioner with consent of the parents;
- 24 (c) the child is 14 years of age or older and desires the amendment;
- 25 (d) one parent has willfully and consistently:
- 26 (i) refused to allow the child to have any contact with the other parent; or
- 27 (ii) attempted to frustrate or deny contact with the child by the other parent; or
- 28 (e) one parent has changed or intends to change the child's residence in a manner that significantly
29 affects the child's contact with the other parent.

30 (2) A court may modify a de facto parenting arrangement in accordance with the factors set forth in

1 40-4-212.

2 (3) The court shall presume a parent is not acting in the child's best interest if the parent does any of the
3 acts specified in subsection (1)(d) or (8).

4 (4) The court may amend the prior parenting plan based on subsection (1)(e) to provide a new residential
5 schedule for parental contact with the child and to apportion transportation costs between the parents.

6 (5) Attorney fees and costs must be assessed against a party seeking frivolous or repeated amendment
7 if the court finds that the amendment action is vexatious and constitutes harassment.

8 (6) A parenting plan may be amended upon the death of one parent pursuant to 40-4-221.

9 (7) As used in this section, "prior parenting plan" means a parenting determination contained in a judicial
10 decree or order made in a parenting proceeding. In proceedings for amendment under this section, a proposed
11 amended parenting plan must be filed and served with the motion for amendment and with the response to the
12 motion for amendment. Preference must be given to carrying out the parenting plan.

13 (8) (a) If a parent or other person residing in that parent's household has been convicted of any of the
14 crimes listed in subsection (8)(b), the other parent or any other person who has been granted rights to the child
15 pursuant to court order may file an objection to the current parenting order with the court. The parent or other
16 person having rights to the child pursuant to court order shall give notice to the other parent of the objection as
17 provided by the Montana Rules of Civil Procedure, and the other parent has 20 days from the notice to respond.
18 If the parent who receives notice of objection fails to respond within 20 days, the parenting rights of that parent
19 are suspended until further order of the court. If that parent responds and objects, a hearing must be held within
20 30 days of the response.

21 (b) This subsection (8) applies to the following crimes:

22 (i) deliberate homicide, as described in 45-5-102;

23 (ii) mitigated deliberate homicide, as described in 45-5-103;

24 (iii) sexual assault, as described in 45-5-502;

25 (iv) sexual intercourse without consent, as described in 45-5-503;

26 (v) deviate sexual conduct with an animal, as described in 45-2-101 and prohibited under 45-5-505;

27 (vi) incest, as described in 45-5-507;

28 (vii) aggravated promotion of prostitution of a child, as described in 45-5-603(1)(b);

29 (viii) endangering the welfare of children, as described in 45-5-622;

30 (ix) partner or family member assault of the type described in 45-5-206(1)(a);

1 (x) sexual abuse of children, as described in 45-5-625.

2 (9) Except in cases of physical abuse or threat of physical abuse by one parent against the other parent
3 or the child, or when a parent has been convicted of a crime enumerated in subsection (8)(b), the court may, in
4 its discretion, order the parties to participate in a dispute resolution process to assist in resolving any conflicts
5 between the parties regarding amendment of the parenting plan. The dispute resolution process may include
6 counseling or mediation by a specified person or agency, and court action.

7 (10) (a) Except as provided in subsection (10)(b), a court-ordered or de facto modification of a parenting
8 plan based in whole or in part on military service orders of a parent is temporary and reverts to the previous
9 parenting plan at the end of the military service. If a motion for an amendment of a parenting plan is filed after
10 a parent returns from military service, the court may not consider a parent's absence due to that military service
11 in its determination of the best interest of the child unless the military service resulted in an DISMISSAL OR IN A
12 DISCHARGE DESIGNATED AS other than honorable, bad conduct, or dishonorable discharge.

13 (b) A parent who has performed or is performing military service, as defined in 10-1-1003, may consent
14 to a temporary or permanent modification of a parenting plan:

15 (i) for the duration of the military service; or

16 (ii) that continues past the end of the military service."

17
18 **Section 4.** Section 40-4-228, MCA, is amended to read:

19 **"40-4-228. Parenting and visitation matters between natural parent and third party.** (1) In cases
20 when a nonparent seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of
21 this chapter apply unless a separate action is pending under Title 41, chapter 3.

22 (2) A court may award a parental interest to a person other than a natural parent when it is shown by
23 clear and convincing evidence that:

24 (a) the natural parent has engaged in conduct that is contrary to the child-parent relationship; and

25 (b) the nonparent has established with the child a child-parent relationship, as defined in 40-4-211, and
26 it is in the best interests of the child to continue that relationship.

27 (3) For purposes of an award of visitation rights under this section, a court may order visitation based
28 on the best interests of the child.

29 (4) For purposes of this section, voluntarily permitting a child to remain continuously in the care of others
30 for a significant period of time so that the others stand in loco parentis to the child is conduct that is contrary to

1 the parent-child relationship.

2 (5) It is not necessary for the court to find a natural parent unfit before awarding a parental interest to
3 a third party under this section.

4 (6) If the parent receives military service orders that involve moving a substantial distance from the
5 parent's residence or otherwise have a material effect on the parent's ability to parent the child for the period the
6 parent is called to military service, as defined in 10-1-1003, the court may grant visitation rights to a family
7 member of the parent with a close and substantial relationship to the minor child during the parent's absence if
8 granting visitation rights is in the best interests of the child as determined by 40-4-212."

9
10 **Section 5.** Section 40-4-234, MCA, is amended to read:

11 **"40-4-234. Final parenting plan criteria.** (1) In every dissolution proceeding, proceeding for declaration
12 of invalidity of marriage, parenting plan proceeding, or legal separation proceeding that involves a child, each
13 parent or both parents jointly shall submit to the court, in good faith, a proposed final plan for parenting the child,
14 which may include the allocation of parenting functions. A final parenting plan must be incorporated into any final
15 decree or amended decree, including cases of dissolution by default. As used in this section, parenting functions
16 means those aspects of the parent-child relationship in which the parent makes decisions and performs functions
17 necessary for the care and growth of the child, which may include:

18 (a) maintaining a loving, stable, consistent, and nurturing relationship with the child;

19 (b) attending to the daily needs of the child, such as feeding, physical care, development, and grooming,
20 supervision, spiritual growth and development, health care, day care, and engaging in other activities that are
21 appropriate to the developmental level of the child and that are within the social and economic circumstances of
22 the particular family;

23 (c) attending to adequate education for the child, including remedial or other education essential to the
24 best interest of the child;

25 (d) ensuring the interactions and interrelationship of the child with the child's parents and siblings and
26 with any other person who significantly affects the child's best interest; and

27 (e) exercising appropriate judgment regarding the child's welfare, consistent with the child's
28 developmental level and the family's social and economic circumstances.

29 (2) Based on the best interest of the child, a final parenting plan may include, at a minimum, provisions
30 for:

(a) designation of a parent as custodian of the child, solely for the purposes of all other state and federal statutes that require a designation or determination of custody, but the designation may not affect either parent's rights and responsibilities under the parenting plan;

(b) designation of the legal residence of both parents and the child, except as provided in 40-4-217;

(c) a residential schedule specifying the periods of time during which the child will reside with each parent, including provisions for holidays, birthdays of family members, vacations, and other special occasions;

(d) finances to provide for the child's needs;

(e) any other factors affecting the physical and emotional health and well-being of the child;

(f) periodic review of the parenting plan when requested by either parent or the child or when circumstances arise that are foreseen by the parents as triggering a need for review, such as attainment by the child of a certain age or if a change in the child's residence is necessitated;

(g) sanctions that will apply if a parent fails to follow the terms of the parenting plan, including contempt of court;

(h) allocation of parental decisionmaking authority regarding the child's:

(i) education;

(ii) spiritual development; and

(iii) health care and physical growth;

(i) the method by which future disputes concerning the child will be resolved between the parents, other than court action; and

(j) the unique circumstances of the child or the family situation that the parents agree will facilitate a meaningful, ongoing relationship between the child and parents.

~~(3) A court may not consider military service, as defined in 10-1-1003, against or to the detriment of a parent performing military service when approving a final parenting plan. IN APPROVING A FINAL PARENTING PLAN FOR A CHILD OF A PARENT IN MILITARY SERVICE, THE COURT MAY NOT DISAPPROVE THE PLAN ONLY BECAUSE OF THE PARENT'S MILITARY SERVICE unless the military service resulted in an DISMISSAL OR IN A DISCHARGE DESIGNATED AS other than honorable, bad conduct, or dishonorable discharge.~~

~~(3)(4)~~ The court may in its discretion order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding adoption of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency or court action.

~~(4)(5)~~ Each parent may make decisions regarding the day-to-day care and control of the child while the

1 child is residing with that parent, and either parent may make emergency decisions affecting the child's safety
2 or health. When mutual decisionmaking is designated in the parenting plan but cannot be achieved regarding a
3 particular issue, the parents shall make a good faith effort to resolve the issue through any dispute resolution
4 process provided for in the final parenting plan.

5 ~~(5)~~(6) If a parent fails to comply with a provision of the parenting plan, the other parent's obligations
6 under the parenting plan are not affected.

7 ~~(6)~~(7) At the request of either parent or appropriate party, the court shall order that the parenting plan
8 be sealed except for access by the parents, guardian, or other person having custody of the child."

9 - END -